No. 18-525

IN THE

Supreme Court of the United States

FORT BEND COUNTY, TEXAS,

Petitioner,

v.

LOIS M. DAVIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PROFESSOR SCOTT DODSON AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

I am the Geoffrey C. Hazard Jr. Distinguished Professor of Law at the University of California Hastings College of Law, where I teach and write on federal jurisdiction and civil procedure. I have an academic and pedagogical interest in the clarification of the boundaries, scope, and regulatability of federal jurisdiction. On that basis, I submit this short brief in support of neither party to aid the Court's consideration of these issues.[1]

SUMMARY OF ARGUMENT

The precise question confronting the parties on this appeal is:

> Did the district court err in dismissing the Respondent's claim for failure to exhaust when the Petitioner did not timely assert an exhaustion defense?

That question can and should be answered directly by resort to statutory construction, common-law traditions, and administrative policy.

Rather than answering this question directly, the parties and courts below have focused on a different question: whether Title VII's exhaustion requirement is jurisdictional. But resolving this jurisdictional issue does not answer the question confronting the parties. This Court should answer the question confronting the parties without resolving whether the exhaustion requirement is jurisdictional.

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[1] My institutional affiliation is provided for identification purposes only. No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund its preparation or submission. All parties have filed blanket consents to amicus briefs.

ARGUMENT

THE COURT SHOULD DECIDE THIS CASE WITHOUT RESOLVING THE JURISDICTIONAL CHARACTER OF SECTION 2000e-5.

1. More than two decades ago, this Court, concerned that jurisdiction "is a word of many, too many, meanings," embarked on a mission to bring clarity to jurisdictional doctrine. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quotation cleaned up). Subsequent opinions have brought new attention and thinking to questions of jurisdiction. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13 (2017); *United States v. Wong*, 135 S. Ct. 1625 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004).

2. At times, this Court has taken a jurisdiction-first approach of deciding the jurisdictional character of a rule in order to define its effects. In *Bowles*, for example, the Court held that the deadline to file a notice of appeal in a civil case is jurisdictional and therefore not subject to equitable exceptions. *Bowles*, 551 U.S. at 212-14. The Court engaged no separate analysis of the deadline's effects; the jurisdictional holding automatically led to the determination that equitable exceptions were not allowed.

This jurisdiction-first approach assumes that jurisdictional rules have immutable and defined characteristics, namely, that they are not subject to principles of equity, discretion, estoppel, forfeiture, consent, or waiver, and courts must police them sua sponte at all times prior to final judgment.

The jurisdiction-first approach also assumes that nonjurisdictional rules have (at least presumptively) the inverse effects of jurisdiction. *See, e.g., Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar sua sponte.") (original emphasis); *id.* at 213 (Scalia, J., dissenting) (stating that ordinary time-bar defenses "are nonjurisdictional and thus subject to waiver and forfeiture").

These assumptions underlying the jurisdiction-first approach are flawed. In truth, the jurisdictional characterization of a rule does not inexorably define its effects.

3. The flaw is easier to appreciate with nonjurisdictional rules. Nonjurisdictional rules can have effects typically associated with jurisdictional rules, such as being nonwaivable or unsusceptible to equitable exceptions. *See* Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 6 (2008).

Indeed, although exhaustion requirements are often treated as nonjurisdictional preconditions to suit, those exhaustion requirements nevertheless often exhibit jurisdiction-like effects. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("We agree with the Court of Appeals that the [habeas] exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not

jurisdictional."); *Granberry v. Greer*, 481 U.S. 129, 133 (1987) (holding that appellate courts have discretion to consider a habeas petitioner's failure to exhaust even if the State did not assert the defense); 28 U.S.C. § 2254(b)(3) (providing that the habeas exhaustion requirement cannot be forfeited by the State); *Jones v. Bock*, 549 U.S. 199, 211-16 (2007) (holding the PLRA's exhaustion requirement to be mandatory but an affirmative defense that must be asserted in the answer).

The point is that nonjurisdictional rules—including nonjurisdictional exhaustion requirements—can have jurisdiction-like effects that might make them nonforfeitable or mandatory. *E.g.*, *Nutraceutical Corp. v. Lambert*, No. 17-1094, slip op. at 4 (2019) ("Whether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.").

4. Although harder to appreciate, the flip side is true as well: jurisdictional rules can have nonjurisdictional effects, in myriad ways. *See* Scott Dodson, *Hybridizing Jurisdiction*, 99 Calif. L. Rev. 1437 (2011).

Most pertinent to this case is the species of jurisdictional preconditions, in which an event or action is required to confer jurisdiction. Though such a precondition is a predicate to jurisdiction, the precondition itself need not be unwaivable or incurable or inexcusable. *Id.* at 1463-65.

For example, although a timely notice of appeal is required to confer appellate jurisdiction in a civil case, *Bowles*, 551 U.S. at 214, what constitutes an effective "notice" is subject to judicial discretion,

Becker v. Montgomery, 532 U.S. 757, 765 (2001) (allowing an appellant to correct a defective notice of appeal); *Smith v. Barry*, 502 U.S. 244, 245 (1992) (treating an appellate brief as a notice of appeal); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (deeming a notice of appeal from the denial of a motion to vacate to be a notice of appeal from the underlying judgment). Similarly, although the issuance of a certificate of appealability in a habeas case is a precondition to appellate jurisdiction, *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), what constitutes an effective certificate of appealability is a nonjurisdictional question, *Gonzalez*, 565 U.S. at 143-45 ("A defective COA is not equivalent to the lack of any COA.").

This Court has characterized some exhaustion requirements as prerequisites to jurisdiction, but that characterization has not automatically conferred all of the usual attributes of jurisdictionality upon the exhaustion requirement itself. For example, the statutory requirement that social-security claimants receive a final decision from the Social Security Commissioner before filing a claim in federal court, *see* 42 U.S.C. § 405(g), is a "jurisdictional prerequisite" that contains "a waivable element [that] the administrative remedies provided by the [Commissioner] be exhausted." *Matthews v. Eldridge*, 424 U.S. 319, 327-30 (1976); *see also Heckler v. Day*, 467 U.S. 104, 110 n.14 (1984) ("The jurisdictional requirement that administrative remedies be exhausted is waivable."). A claimant's failure to comply with this waivable part of the exhaustion requirement is also excusable by the courts even absent the Commissioner's waiver. *Bowen v. City of New York*, 476 U.S. 467, 484-86 (1986).

5. The teaching of these cases is that the jurisdictional characterization of an exhaustion requirement does not conclusively determine whether an exhaustion defect can be cured, or forfeited, or enforced by a district court despite party forfeiture.

For that reason, resolving the jurisdictional character of 42 U.S.C. § 2000e-5's exhaustion requirement will not resolve whether the district court correctly dismissed the Respondent's unexhausted claim. If the exhaustion requirement is a jurisdictional precondition, it might still be forfeitable or excusable or curable. If the exhaustion requirement is nonjurisdictional, it might still be mandatory or enforceable despite the circumstances. Resolving the jurisdictional issue simply does not answer the real question confronting the parties: whether the district court was correct to dismiss for failure to exhaust.

6. Rather than take a jurisdiction-first approach, this Court should take an effects-based approach that avoids the jurisdictional issue and instead construes the effects of the rule directly. This Court has taken such an approach before. In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Court was presented with the question of whether RCRA's 60-day notice requirement was a limit on federal subject-matter jurisdiction. However, the Court declined to answer that question and instead answered the narrow question presented by the facts of the case: whether the requirement was amenable to equitable exceptions. *Id.* at 31. The Court answered that question directly without addressing the jurisdictional character of the notice requirement.

Likewise, the petition for certiorari in *John R. Sand* asked this Court to decide "[w]hether the statute of limitations in 28 U.S.C. § 2501 limits the subject matter jurisdiction of the Court of Federal Claims." Pet. Br. at i, *John R. Sand & Gravel Co. v. United States*, No. 06-1164, 2007 WL 2236607 (Aug. 3, 2017). The precise issue in that case, however, was whether a court must enforce the limitations period even if the United States, as a party-defendant, waives the issue. In its opinion, the Court rephrased the question presented to reflect these terms and resolved that issue alone. *John R. Sand*, 552 U.S. at 132. In the process, this Court carefully avoided characterizing the limitations period as jurisdictional or nonjurisdictional. *Id.* at 133-35 (characterizing the time bar as a "more absolute" bar that justifies departure from usual waiver rules); *cf. id.* at 134 (suggesting that prior cases' use of the term "jurisdictional" was "[a]s convenient shorthand").

7. This Court should take the approach of *Hallstrom* and *John R. Sand* in deciding this case. That effects-based approach, unlike a jurisdiction-first approach, will answer the narrow and precise question actually at hand: whether the district court erred in dismissing the Respondent's complaint for lack of exhaustion despite the Petitioner's failure to timely raise the exhaustion issue.

This brief does not urge a particular answer to that question. Perhaps the importance of Title VII exhaustion justifies the district court's dismissal despite the Petitioner's forfeiture or any considerations of equity. Perhaps the preference for party autonomy means that the Petitioner's forfeiture disables the district court from dismissing for lack of

exhaustion. Perhaps the Respondent's exhaustion of her related sexual-harassment and retaliation claims should, under the circumstances, be deemed effective exhaustion of her religious-discrimination claim. Perhaps the district court should have exercised discretion to stay the case to allow the Respondent an opportunity to exhaust the religious-discrimination claim.

The right answer will depend upon ordinary principles of statutory construction, common-law traditions, and administrative policy. It need not—should not—depend upon jurisdictional classification.

CONCLUSION

For these reasons, this Court should determine the effect of Title VII's exhaustion requirement in this case without regard to the exhaustion requirement's jurisdictional status.

Respectfully submitted,

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